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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 313

E. F. HAMMONS,
Petitioner,

v.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. WILL THE PROTECTION OF THE SEVENTH AMENDMENT BE DENIED TO RESPONDENT?

II. WILL THE SUPREME COURT REDETERMINE THE FACTS FOUND BY A JURY?

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. Petitioner, a switchman by profession, brought suit for negligence under the Federal Employers' Liability Act in the State Court of Texas (although he could have elected to bring suit in the Federal Court). He selected trial by jury. This petition is simply an appeal by a litigant to a higher court to save him from an adverse jury verdict on the only issue of liability requested by him: Whether

respondent negligently failed to maintain a section of railroad track. The testimony presented by plaintiff (and "corroborated" by his friends) was directly contradicted by the roadmaster in charge of maintenance and the current track inspector. The District Court and the three Justices of the Court of Civil Appeals agreed that the resolution of the conflict was properly made by the jury. Surely the protection incident to the institution of trial by jury, as provided for in the Federal Employers' Liability Act and as guaranteed by the Seventh Amendment, is afforded equally to the parties in a lawsuit, plaintiff or defendant. Respondent has been vindicated by a jury whose verdict has been sustained on appeal. The matter should now be at an end.

2. Petitioner wishes to translate such cases as *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 into a holding that, in a FELA case, the jury *must* find a railroad negligent on very little evidence, regardless of the credibility of the witnesses. If the jury does not find negligence, petitioner wants an appellate fact finding, inconsistent with the jury's, that the railroad was negligent. However, *Rogers* and other similar decisions, e.g. *Maynard* v. *Durham & S.R. Co.*, 365 U.S. 160; *Michalic* v. *Cleveland Tankers Inc.*, 364 U.S. 325, present the exact opposite situation. Those were cases wherein the Supreme Court reviewed the evidence because the lower court had taken the case away from the jury for judicial determination. The effect of the Court's opinions in those cases was to protect — not to destroy — the jury's verdict. To achieve his own result, petitioner would have this Court undermine the many decisions required to uphold the integrity of the jury's verdicts against judges' efforts to substitute their views of the way the jury should have found the facts.

3. The Supreme Court, as an appellate Court bound by the Seventh Amendment, would uphold the findings of the

jury. As stated in *Atlantic & Gulf Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 358-359, the Supreme Court cannot "redetermine facts found by the jury . . ." and "Where there is a view of the case that makes the jury's answers to the special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." 369 U.S. at 364.

4. It is indeed strange that the petitioner calls upon the Supreme Court to apply the state standard of the sufficiency of the evidence instead of the federal standard, which has been so carefully established in such cases as *Rogers* v. *Missouri Pacific R. Co., supra.* In addition to a "no evidence" power of review over the jury's verdict, the State courts of Texas have the power to reverse and to remand a case, even when there is sufficient evidence to require submission to the jury, whenever, in the opinion of the Court of Civil Appeals, the verdict is "against the great weight and overwhelming preponderance of the evidence." Chief Justice Robert Calvert, " 'No Evidence' and 'Insufficient Evidence' Points of Error," 38 Texas L. Rev. 361; e.g. *In Re King's Estate,* 150 Tex. 662, 244 S.W. 2d 660. This power exists because the Texas Constitution, unlike the Seventh Amendment to the federal Constitution, provides that the Court of Civil Appeals, not the jury, has the final power to decide all fact questions. Tex. Const. Art. 5 §6. An unsuccessful effort has already been made to apply the Texas standard to FELA cases. In the case culminating in *Deen* v. *Hickman,* 358 U.S. 57, this Court made it clear that the federal standard, not the Texas standard, applied in FELA cases. Nevertheless, petitioner invites this Court to use the state standard as a device to supplant the jury's function in FELA cases tried in Texas state courts.

5. Petitioner's complaints regarding the submission of an issue inquiring whether the accident happened without

the negligence of any party to the event is academic, since the jury found that there was no negligence on the part of the respondent.

6. Petitioner's final complaint is that he was impeached in his cross-examination through the use of prior inconsistent statements made in connection with other claims against the respondent. As the Court below noted, petitioner never requested the trial Court to instruct the jury not to consider the impeachment in judging petitioner's credibility. (Petition, p. 62)

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should not be granted.

Respectfully submitted

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TOM MARTIN DAVIS

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RICHARD B. MILLER

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GORDON GOOCH

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of August, 1965, a true and correct copy of this Brief in Opposition was served on John P. Spiller, 1307 Sterling Building, Houston, Texas 77002 by placing same in the United States mails, properly addressed, postage prepaid, certified mail.

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TOM MARTIN DAVIS